



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

pmoates@sidley.com
(202) 736 8175

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
LONDON
LOS ANGELES

FOUNDED 1886

NEW YORK
PALO ALTO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

231564

December 23, 2011

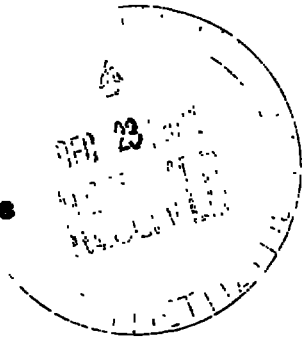
By Hand Delivery

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

DEC 23 2011

Part of
Public Record



Re: *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No.
NOR 42125

Dear Ms. Brown:

Norfolk Southern Railway Company ("NS") respectfully submits this letter in response to E.I. du Pont de Nemours and Company ("DuPont")'s "Reply to Norfolk Southern Railway Company's Reply to Complainant's Second Motion to Compel Procedural Schedule" filed December 21 in the above-referenced proceeding (hereinafter "Reply to Reply" or "Surreply").¹ The Board should enforce its rules and disregard DuPont's improper pleading. 49 C.F.R. 1104.13 (replies to replies are not permitted). If the Board nonetheless chooses to accept DuPont's Surreply, fundamental fairness dictates that it also consider NS's following summary responses to DuPont's new allegations and arguments.²

DuPont had all the data it needed well before November 21. DuPont had the ability to link the data and either did not know it or preferred a different method. In either event, DuPont

¹ DuPont's Surreply is just the latest example of complainants in SAC cases routinely disregarding 49 C.F.R. § 1104.13(c) by filing replies to replies. For example, "replies to replies" were filed by DuPont in this proceeding on July 12, 2011; by the complainant in *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Co. & Union Pacific Railroad Co.* Docket No. 42130 on December 19, 2011; by the complainant in *M&G Polymers USA LLC v. CSX Transp., Inc.*, Docket No. 42123 on February 15, 2011 and April 19, 2011; and by the complainant in *TOTAL Petrochemicals USA, Inc. v. CSX Transp. Inc.*, STB Docket No. 42121 on October 27, 2010, November 29, 2010, and December 28, 2010.

² Under § 1104.13 the respondent to a motion is entitled to reply to the movant's allegations. That is, the movant opens the argument and the respondent closes. Here, however, DuPont has filed a Surreply as a device to get a second bite at the apple and advance new rationales for its request for an unprecedented extension of time.

Cynthia T. Brown
 December 23, 2011
 Page 2

cannot justify a 90-day extension. Finally, NS reiterates its core principles: NS must be treated equally, and this case must be resolved within three years per 49 U.S.C. 10704(a)(3)(b), which is a statute DuPont ignores, and which makes 49 U.S.C. 11701 applicable to rate cases.

I. DuPont Had the Ability to Link the Data Before November 21 And Either Did Not Know It or Later Decided It Preferred Another Method.

DuPont may have decided late in the discovery period when it tendered RFP 171 that it preferred a different method,³ but DuPont had the information it needed to link the data. DuPont claims in its Surreply that “SPLC OS MP.xls” is necessary to link traffic event data to density data, alleging that “car and intermodal event data (which contains SPLC and station location information)” must be linked to “density data (which contains milepost information),” and that this linking cannot occur without using “SPLC OS MP.xls” to link the data sets. Surreply at 2 (emphasis added). This is simply false. DuPont fails to mention that NS’s density data also provides station location information. The chart reproduced in the footnote below is a selection of rows from the density records that NS produced to DuPont on May 5, 2011.⁴ The last two

³ DuPont’s newly-minted claim that the “SPLC OS MP.xls” spreadsheet produced in response to RFP 171 was responsive to DuPont’s earlier RFPs 21 and 23 is undermined by DuPont’s own representations to NS in discovery. NS’s Reply demonstrated that DuPont did not tender RFP 171 until September 29, the next-to-last day of discovery. Reply at 14. On September 30, DuPont provided NS with a summary of “discovery requests to which the NS responses remain incomplete.” See Attachment 1 (Sept. 30, 2011 Letter from J. Moreno to P. Hemmersbaugh). The only “follow-up” open items it listed for traffic-related discovery requests (including RFPs 21 and 23) were those included in the “September 21 and 26 letters from DuPont to NS,” which NS described in its Reply at 11-12. *Id.* at 2. RFP 171’s request for a database linking mileposts to SPLCs and operating stations was not listed as an “open item” from previous requests but rather as a new discovery request (served September 29) for which “responses are not yet due.” *Id.* at 1, 2. Given its representation to NS that RFP 171 was not encompassed by RFPs 21 and 23, DuPont is estopped from now claiming the opposite.

⁴ Columns showing the confidential density data have been omitted:

From	to	from	to	route	from	to
Location	location	milepost	milepost	miles	station	station
RO VA	POTYARDS VA	003.00	004.00	1.00	B1139	4
POTYARDS VA	ALEXANDR VA	004.00	008.00	4.00	4	8
ALEXANDR VA	AFTOWER VA	008.00	009.10	1.10	8	7
AFTOWER VA	AFTOW.SC VA	009.10	009.15	0.05	7	13
AFTOW.SC VA	CAMRNJCT VA	009.15	009.20	0.05	13	9
CAMRNJCT VA	CAMERON VA	009.20	010.00	0.80	9	12
CAMERON VA	CRTOWER VA	010.00	010.70	0.70	12	11
CRTOWER VA	VANDOREN VA	010.70	011.04	0.34	11	10
VANDOREN VA	EDSALL VA	011.04	012.40	1.36	10	14
EDSALL VA	SPRINGFI VA	012.40	015.00	2.60	14	15

Cynthia T. Brown
December 23, 2011
Page 3

“from station” and “to station” columns represent the “station location” information that DuPont’s Surreply erroneously claims was absent from the density data. Simply put, the “station location” field – produced on May 5, two months before the original close of discovery -- gave DuPont everything it needed to link density data to traffic event data, including SPLC.⁵ DuPont further claims that “SPLC OS MP.xls” was also “a critical link” between car event data and train event data. But its Surreply admits that the previously produced traffic files had “common fields that NS provided to link the two data sets.” Thus, DuPont’s complaint is apparently limited to its unelaborated claim that it does not deem those links “adequate.” Surreply at 3. If DuPont truly believed that it needed to link the train event milepost field to the station location field in the car event data, it easily could have done so with the data NS provided, including the density data produced on May 5. For example, it could have used that density data to map mileposts to station location information. DuPont may now think that the “SPLC OS MP.xls” spreadsheet that NS produced at DuPont’s request provides a more convenient means to link traffic data, but that belief does not change the fact that it had ample means to make those links many months ago.

II. DuPont’s Own Rationale Provides No Support for an Extension of 90 Days.

Even after filing an impermissible Surreply, DuPont still has not explained why the alleged traffic data production delays it complains about justify another extension of 90 additional days. In fact, DuPont’s own logic, rationale, and version of the facts together could only support an extension to March 20, 2011. DuPont continues to argue that it needed “four full months” (120 days) after the production of “complete and usable traffic data” to prepare its opening evidence. Motion at 6. Even assuming, *arguendo*, that DuPont lacked usable traffic data until November 21, 120 days from that date would extend the deadline for Opening Evidence to March 20. Even under DuPont’s view of the world, Opening Evidence would be due 41 days before the April 30 due date that DuPont seeks.

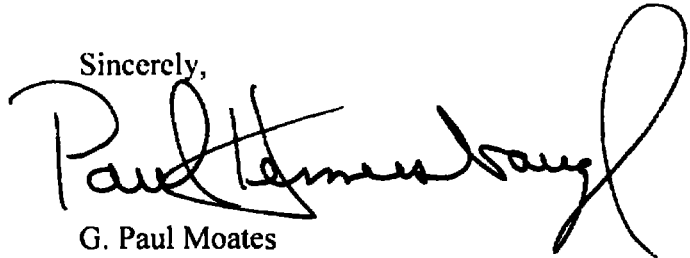
Unable to justify such a long extension based on the facts, DuPont continues to reiterate how complex this case is. In its Motion, it described this case as one of “unprecedented scope” involving an “unprecedented amount of traffic data” and said that the number of issues is “greater than a typical proceeding, proportionate to the larger scope of this proceeding.” Motion at 7-8. In its Surreply, DuPont beat the same drum. Surreply at 6. Complexity and the size of the proceeding is a two way street. No doubt the SARR that DuPont must build is big, expensive to build around Eastern mountains and through urban areas, and difficult to design and operate. Replicating a carload network in the East is far different from replicating a unit coal train network in the West. However, DuPont attempts to deal with these realities, NS will have to deal with the same complexities and decipher DuPont’s attempts to address those complexities.

⁵ NS produced the same density data and information for 2008 and 2009 even earlier, on February 25, 2011.

Cynthia T. Brown
December 23, 2011
Page 4

That is why it is essential for NS to be treated equally in a proceeding that concludes within the statutory period.⁶

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized flourish at the end.

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren

Counsel to Norfolk Southern Railway Company

Attachment

CC: Jeffrey Moreno

⁶ Although this is not the time to litigate the statutory period issue, which would be mooted if the Board issues a decision within the mandated timeframe, NS continues to believe that the three-year period applies to this case.



ATLANTA

CINCINNATI

COLUMBUS

NEW YORK

BRUSSELS

CLEVELAND

DAYTON

WASHINGTON, D.C.

September 30, 2011

By E-Mail and First Class Mail

Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

**RE: E.I. du Pont de Nemours and Company v. Norfolk Southern Railway
Company, STB Docket No. 42125**

Dear Paul:

As you know, today is the close of the extended discovery period in the above-referenced proceeding. In order to facilitate the completion of discovery, DuPont has prepared the attached list of its discovery requests for which the NS responses remain incomplete. Part A identifies those discovery requests to which no response has been received at all, recognizing that some of those responses are not yet due. Part B identifies various follow-up correspondence from DuPont to NS that are currently open and awaiting responses from NS. Please let me know if your understanding of the status of NS's discovery responses is different.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno".

Jeffrey O. Moreno

List of Open Discovery Items - STB Docket No. 42125 DuPont v NS

Interrogatory / Request For Production (1)	Interrogatory / Request For Production Topic (2)	Open Item(s) (3)
A. Items Not Responded to by NS		
1 Int 28	Please identify the specific NS line segments included in the 10,000 miles of rail line referenced in the Manion/Hamberger Joint Statement on which NS does not expect TIH and passenger traffic will move in 2015	Response Due September 29th
2 RFP 169	Please provide all NS analyses and forecasts which support NS' position that certain passenger and TIH traffic will not move in 2015 over NS's portion of the 10,000 miles referenced in the Manion/Hamberger Joint Statement	Response Due September 29th
3 RFP 170	Please provide any statements, references and/or forecasts from TIH shippers that they will not transport TIH materials over NS rail lines included in the 10,000 miles referenced in the Manion/Hamberger Statement beginning in 2015.	Response Due September 29th
4 RFP 171	Please produce an electronic database that identifies the specific NS milepost associated with each of the unique NS SPLC and each of the unique NS operating station code that are included on the entire NS system	Response Due October 19th
5 RFP 172	Please produce all computer programs and simulation software currently used by NS to simulate or model a rail network equipped with PTC	Response Due October 19th
B. Follow-up		
6 Int 5	Description of each DuPont movement	September 9 letter from Dupont to NS
7 Int 6 and RFP 15	NS Interchange locations and procedures	September 29 letter from DuPont to NS
8 RFP 17	Short lines	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
9 RFP 18	Operating statistics and density for all traffic by commodity	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
10 RFP 19	Density by segment	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
11 RFPs 20, 21, 22, 23, 34, 35, 36	Traffic, revenue, events and linking	September 21 and 26 letters from Dupont to NS
12 RFP 29	NS transportation contracts	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
13 RFP 30	All forecasts and documents prepared by or for NS from 2008 to the present, or in NS possession, of future traffic volumes and/or revenues	September 9 letter from Dupont to NS
14 RFP 37	NS statistics for origin mines	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
15 RFP 44	Measurement and/or analysis of cycle and/or transit times	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
16 RFP 45	Projected and actual cycle times, and the standard or expected or contractual cycle time	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
17 RFP 54	NS helper services	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
18 RFP 58	Locomotive tonnage ratings by line segments and Tractive effort tables	September 9 letter from Dupont to NS
19 RFP 65	NS crew districts	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events
20 RFP 75	Joint facility or joint use	September 21 and 26 letters from Dupont to NS as RFP is related to traffic, revenue and events, September 27 email from Dupont to NS, September 29 letter from DuPont to NS
21 RFP 77	Freight car information (purchased or leased by NS) -- each year or partial year 2006 to the present	September 9 letter from Dupont to NS
22 RFP 84	Railcar maintenance agreements with outside contractors	September 9 letter from Dupont to NS
23 RFP 86	Locomotive maintenance agreements with outside contractors	September 9 letter from Dupont to NS
24 RFP 89	Contracts/agreements with third parties related to the performance of locomotive fueling functions	September 9 letter from Dupont to NS
25 RFP 100	Operating or administrative expenses incurred by NS for each year from 2007 to the present as a result of handling hazardous materials	September 9 letter from Dupont to NS
26 RFP 101	Maintenance-of-way equipment owned or leased by NS	September 9 letter from Dupont to NS
27 RFP 104	TCS and TDIS revenues and costs	September 9 letter from Dupont to NS
28 RFP 106	Automotive Distribution Facility assets	September 9 letter from Dupont to NS
29 RFP 108	Facilities - location, size, components, original cost and year built	September 9 letter from Dupont to NS
30 RFP 109	Each facility identified in response to RFP 108 subparts (l), (m), (n), (o) and (p): (a) The annual costs to operate each facility separated by function, and (b) the annual throughput of each facility, for each year 2008 to the present	September 9 letter from Dupont to NS
31 RFP 112	Third party services purchased by NS, TCS, and/or TDIS	September 9 letter from Dupont to NS
32 RFP 121	Grading construction activities undertaken or proposed	September 9 letter from Dupont to NS
33 RFP 122	Grading costs	September 9 letter from Dupont to NS
34 RFP 125	Construction and rehabilitation projects which exceeded \$500,000 in cost and was completed by NS or an outside contractor acting on NS' behalf	September 29 letter from DuPont to NS
35 RFP 126	Non NS Projects paid in part or in whole by NS	September 29 letter from DuPont to NS

